NO. 80-1176

APR 8 1981
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

CHARLES E. BLOCK,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

WHETHER A DEFENDANT, PROPERLY CHARGED WITH A CRIMINAL OFFENSE, MAY BE TRIED FOR THAT OFFENSE NOTWITHSTANDING THE ILLEGALITY OF HIS ARREST.

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OPINION BELOW

The opinion of the Arkansas Supreme Court is found at 270 Ark. 671, 606 SW2d 362 (1980), and is reproduced in the appendix to the Petition for Writ of Certiorari at page 11.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257(3) as the basis of this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition has adequately set forth the constitutional provisions involved.

STATEMENT OF THE CASE

On January 3, 1980, Officer Ivan Jones of the Little Rock Police Department investigated an aggravated robbery which had occurred that evening at the Raintree Apartments. He had a conversation with a suspect, Timothy Gomillion, regarding the robbery and Gomillion was subsequently arrested. Gomillion gave officer Jones a statement which implicated the petitioner, Charles E. Block. No further arrests were made the night of the incident. Two days later, on January 5, 1980, at about 6:30 p.m., Officers Jones and Garner went to the home of Charles Block, the petitioner, to arrest him. The officers did not have an arrest warrant.

After Block was arrested, he was read his rights and photographed. A photo line up was held about 7:35 p.m. that same evening. Block did not make a statement and there was no search of his home at the time of the arrest.

Prior to trial defense counsel filed a motion to suppress an in-court identification. A hearing was held on this motion April 29, 1980, and the Court denied the motion. Defense counsel also filed a motion to dismiss wherein he moved that the court dismiss the charges alleged in the information against Charles Block. He contended that: 1) He was arrested in his home without a warrant. 2) The officers had sufficient time to secure a warrant of arrest from a magistrate before arresting him in his home. 3) The arrest violated his rights under the Fourth and Fourteenth Amendments of the Constitution.

A brief was filed in support of this motion referring the trial court to United States Supreme Court decisions; *Payton and Riddick v. New York*, 27 CrL 3033 (April 15,

1980) and *United States v. Reed,* 572 F.2d 412 (2nd Cir. 1978). The brief quoted general constitutional language from the opinions but did not specifically discuss the propriety of dismissal as the proper remedy in cases of an arrest in a home absent an arrest warrant.

The State filed its response claiming that: 1) The defense motion, which is based on *Payton v. New York,* April 15, 1980, asks for a remedy which is not available. 2) *Payton v. New York,* involved the application of the exclusionary rule to evidence seized when Police Officers entered a residence to make an arrest without an arrest warrant. 3) The United States Supreme Court in *Payton v. New York* explicitly held in footnote 34 that a defendant must stand trial even if the arrest is illegal.

The trial court dismissed the charges against petitioner and that decision was reversed on appeal.

REASONS FOR DENYING THE WRIT

It is noted in Rule 17 of the Rules of the Supreme Court that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The Rule goes on to say that this Court's discretion may be exercised where a state supreme court's ruling is inconsistent or in conflict with a ruling of the federal courts. No such inconsistency is present here.

While the United States Supreme Court has approved warrantless arrests in public places upon probable cause, *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976), prior to the *Payton* case it had reserved ruling on the propriety of such arrests in private dwellings. See, in this regard, *United States v. Santana,* 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *United States v. Watson,* supra; *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Jones v. United States,* 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958).

As a general rule, the concern of the Court has not been the validity of the warrantless arrest itself. Rather the fear has been that a warrantless arrest might be used as a subterfuge to seize, and then use at trial, evidence which may not have been secured by legal search and seizure procedure.

For example Mr. Justices Marshall and Brennan made the following comment in dissenting from the decision in *Santana, supra,* upholding the admissibility of evidence seized from Santana pursuant to her warrantless arrest while standing in the threshold of her home:

> While a police decision that the time is right to arrest a suspect should properly be given great deference, cf. *Hoffa v. United States,* 385 U.S. 293, 310, 17 L.Ed.2d 374, 87 S.Ct. 408 (1966), the power to arrest is an awesome one and is subject to abuse. An arrest may permit a search of premises incident to the arrest, a search that otherwise could be carried out only upon probable cause and pursuant to a search warrant. Likewise, an arrest in circumstances such as those presented here may create exigency that may justify a search or another arrest. When an arrest is so timed that it is no more than an attempt to circumvent the warrant requirement, I would hold the subsequent arrest or search unlawful.

427 U.S. 48, 49. There was no intimation by any member of the Court, here or in subsequent cases, that a warrantless arrest would result in the drastic remedy of dismissal of charges.

In *United States v. Blue,* 234 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966) the Court stated the following on the subject:

> "While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. *Weeks v. United States,* 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341, LRA 1915B 834; *Rogers v. Richmond,* 365 U.S. 534, 5 L.Ed.2d 760, 81 S.Ct. 735; *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct.

> 1684, 84 ALR2d 933; *Nardone v. United States,* 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266; *Mallory v. United States,* 354 U.S. 449, 1 L.Ed.2d 1479, 77 S.Ct. 1356. Our numerous precedents ordering the exclusion of such illegally obtained evidence *assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."* [Emphasis added]

In *Gerstein v. Pugh,* 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) the Court made the following comments on this same subject:

> *"Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. Frisbie v. Collins,* 342 U.S. 519, 96 L.Ed. 541, 72 S.Ct. 509 (1952); *Ker v. Illinois,* 119 U.S. 436, 30 L.Ed. 421, 7 S.Ct. 225 (1886)." [Emphasis added]

In other words, an illegal arrest, without more, does not bar subsequent prosecution, nor is it a defense to a valid conviction. Thus, the illegality of petitioner's original detention does not deprive the government of the opportunity to prove his guilt through introduction of evidence wholly untainted by police misconduct.

In the *United States v. Crews,* 63 L.Ed.2d 537 (March 25, 1980) the Court was faced with the issue of whether the in-court identification of the accused should be suppressed as the fruit of the defendant's unlawful arrest.

In that case, three women (in two separate incidents) reported to the police that they had been accosted and robbed by a black male youth in the women's restroom on the grounds of the Washington Monument. Each victim gave a similar, detailed, description of their assailant.

Within a week of the robberies law enforcement officials observed Crews around the area of the restrooms. Since Crews matched the description of the robber and since he had been observed in the area earlier, the officers detained him and attempted to take a Polaroid photograph of his face. Their efforts were frustrated by inclement weather. Crews was therefore taken into custody as a suspected truant and was photographed at police headquarters.

Subsequently one of the robbery victims positively identified Crew's photograph and he was indicted for robbery. Crews filed a pretrial motion to suppress all identification by his victims contending that his detention on the truancy charges was merely a ruse to allow the officers to obtain further evidence for their robbery investigation.

The trial court ruled that the products of the arrest — the photograph identification and a subsequent line-up identification — would be suppressed, but that an independent courtroom identification would be allowed. Upon conviction, Crews appealed contending that the in-court identification should likewise have been suppressed.

On the issue now before this Court, the Court stated:

> "Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. *Respondent*

> *is not himself a suppressible 'fruit' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through introduction of evidence wholly untainted by the police misconduct. Gerstein v. Pugh,* 420 U.S. 103, 119, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975); *Frisbie v. Collins,* 342 U.S. 519, 96 L.Ed.2d 541, 72 S.Ct. 509 (1952); *Ker v. Illionis,* 119 U.S. 436, 30 L.Ed.2d 421, 7 S.Ct. 225 (1886)."

[Emphasis added] 63 L.Ed.2d 547.

The Court then addressed the issue of whether or not Crew's person was in fact evidence which could be suppressed at trial by not requiring his presence while the victims testified (as opposed to precluding prosecution). 63 L.Ed.2d at 548. Citing *Davis v. Mississippi,* 394 U.S. 721 (1969) the Court implied that a defendant's identification could be suppressed if, but for the illegal activity of the police, that identification would never have been made. 63 L.Ed.2d 549.

A majority of the court agreed with the outcome of the *Crews* decision yet felt compelled to respond to the dicta stated by the Court.

Mr. Justices Blackman and Powell noted:

> I join the Court's opinion except for Part II-D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with Mr. Justice White's view, post, at ——, 63 L.Ed.2d 550, that this claim is foreclosed by the rationale of *Frisbie v. Collins,* 342 U.S. 519, 96 L.Ed. 541, 72 S.Ct. 509 (1952), and *Ker v. Illinois,* 119 U.S. 436, 30 L.

> Ed. 421, 7 S.Ct. 225 (1886). Those cases established that *a defendant properly may be brought into court for trial even though he was arrested illegally*. Thus, the only evidence at issue in this case is the robbery victims' identification testimony. I agree with the Court that the victims' testimony is not tainted.

[Emphasis added] 63 L.Ed.2d 549, 550.

Mr. Justice White, with whom Mr. Chief Justice Burger and Mr. Justice Rehnquist join in concurring, stated:

> The Court today holds that an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest. Although we are unanimous in reaching this result, Mr. Justice Brennan's opinion reserves the question whether a defendant's face can ever be considered evidence suppressible as the "fruit" of an illegal arrest. Because I consider this question to be controlled by the rationale of *Frisbie v. Collins*, 342 U.S. 519, 96 L.Ed. 541, 72 S.Ct. 509 (1952), I write separately.
>
> Respondent Crews was convicted after an in-court identification by the victim whose own presence at trial, recollection and identification the Court holds were untainted by prior illegal conduct by the police. Under these circumstances the manner in which the defendant's presence at trial was obtained is irrelevant to the admissibility of the in-court identification. We held in *Frisbie v. Collins*, supra, at 522, 96 L.Ed. 541, 72 S.Ct. 509, "that the power of a court to try a person for crime is

not impaired by the fact that he has been brought within the court's jurisdiction" unlawfully. *A holding that a defendant's face can be considered evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential.* Such a holding would be inconsistent with the underlying rationale of *Frisbie* from which we have not retreated. *Stone v. Powell*, 428 U.S. 465, 485, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 119, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975).

* * *

Because Mr. Justice Brennan leaves open the question whether a defendant's face can be considered a suppressible fruit of an illegal arrest, a question I think has already been sufficiently answered in *Frisbie*, I cannot join his opinion, although I concur in the result. *I note that a majority of the Court agrees that the rationale of Frisbie forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest.*

[Emphasis added] 63 L.Ed.2d 550, 551.

Less than three weeks later the United States Supreme Court decided the case relied on here by petitioner. In *Payton*, supra, the Court held:

— that the Fourth Amendment to the United States Constitution, made applicable to the States

> by the Fourteenth Amendment (cases cited) prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

63 L.Ed.2d 644. The Court then stated that:

> In these cases, which involve application of the exclusionary rule, the issue is whether certain evidence is admissible at trial.

In a footnote to that statement the Court specifically held:

> *The issue is not whether a defendant must stand trial, because he must do so even if his arrest is illegal.* (Citing Crews, supra).

[Emphasis added] 63 L.Ed.2d 654.

CONCLUSION

This Court need not grant certiorari to reconsider its recent holding and ruling on the present issue. No conflict exists.

Respectfully submitted,

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